Bernard Desker Gary and Others v Thwaites Racing Pte Ltd and Another [2003] SGHC 175

Case Number : Suit 1104/2002

Decision Date : 15 August 2003

Tribunal/Court : High Court

Coram : Kan Ting Chiu J

Counsel Name(s) : Liew Teck Huat (Niru & Co) for the plaintiffs; Andre Arul (Arul Chew & Partners) for the defendants

Parties : Bernard Desker Gary; Chia Swee Tin; Jennifer G Desker; Goh Siok Piew; Quek Sin Hien; Quek Chin Hock — Thwaites Racing Pte Ltd; Malcolm Peter James Lynhurst Thwaites

Contract – Contractual terms – Implied terms – Whether recommended general terms and conditions can be implied to give business efficacy to a contract.

Contract – Contractual terms – Implied terms – Whether recommended general terms and conditions can be incorporated into a contract on the basis that such conditions reflect custom and practice.

Tort – Conversion – Claim in conversion Â– Whether defendants had converted racehorse by mistakenly sending it to Ipoh.

Tort – Negligence – Negligent advice Â– Whether racehorse trainer's assessment of racehorse's suitability for racing constituted negligent advice.

1 Racehorse owners do not train their horses themselves. They buy them and send them to trainers who look after them and prepare them for racing. If the horses do not perform to expectation there may be unhappiness.

2. In this case, the plaintiffs are the horse owners and the defendants the trainers. The first plaintiff Gary Desker has been in horse racing since 1993. He owns horses with other persons, and he manages a stable with the assistance of his wife, the second plaintiff.

3. The second defendant Malcolm Thwaites, a leading horse trainer in Singapore, offers his services through his company, the first defendant. Leigh McKenzie is his racing manager.

4. In July 2000 the plaintiffs imported three horses namely Classic Sport, Supreme Gold and Crypto Charge from the United States, and placed them with the defendants. They bought another horse Palace Star the following month which was also placed with the defendants after it was purchased. This horse was checked by Malcolm Thwaites before it was bought.

5. The horses are no longer with the defendants. Palace Star and Supreme Gold were put down and Classic Sport and Crypto Charge were taken out of the defendants' stables and transferred to another trainer, Stephen Gray.

6. The plaintiffs have instituted these proceedings against the defendants. They identify the issues in their claim as

(i) Whether Malcolm Thwaites gave negligent advice which lead to the purchase of Palace Star.

(ii) Whether the defendants failed to provide proper and adequate treatment for Palace

Star, Classic Sport and Supreme Gold.

(iii) Whether the defendants were negligent in continuing with the training of the horses, Classic Sport, Palace Star and Supreme Gold and racing them, without providing treatment for the injuries they carried.

(iv) Whether the defendants in mistakenly sending Palace Star to Ipoh, converted the horse.

(v) Whether the plaintiffs had agreed that Palace Star should remain in Ipoh under K P Hoy as trainer.

(vi) Whether the plaintiffs gave instructions and authority to the defendants to put down Palace Star in Ipoh.

Palace Star

7. Richard Ang, the owner of Palace Star offered it to Gary Desker. Richard Ang told him it needed an injection to the knee.[1] Gary Desker was interested and intended to send it to trainer Charles Leck if he bought it. When he broached the subject with Leck, he was advised that the horse should be sent to a veterinary surgeon for a check-up before any commitment was made.[2]

8. Before he could arrange for a veterinary examination, he received a telephone call from Malcolm Thwaites, who was at Richard Ang's stable. Gary Desker recounted that "(h)e advised me that the horse was a good horse and all that was needed was an injection to the knee. He confirmed that the asking price of Richard Ang (at S$45,000) was reasonable. I did ask Malcolm Thwaites whether I needed to send the horse to the vet for a report. He represented that he had inspected the horse and there was no need to send it to a vet."[3] He bought Palace Star and sent it to the defendants for training on 30 August 2000.

9. The plaintiffs claimed that "but for the representations made by the 1st Defendants on behalf of the 2nd Defendants *(sic)* that Palace Star was a suitable horse for racing, the Plaintiffs would not have purchased it without extensive medical tests being performed on it as is the practice."[4]

10. In March 2001 Malcolm Thwaites informed Gary Desker that Palace Star required surgery on its fore legs. The operation was undertaken by Dr Ian Fulton on 4 April. Gary Desker recalled that "(a)fter the operation, I had a meeting with Ian, Leigh McKenzie together with the 2nd Plaintiff. At that meeting, I was advised by Mr Fulton that when he performed the surgery, he observed that the horse's fore legs (which he operated on) had wear and tear of an 8-year old horse."[5]

11. Malcolm Thwaites also advised him that Dr Fulton would return in two to three months to review the horse's condition. However, in early June he learnt from Leigh McKenzie that the defendants had sent Palace Star to Ipoh by mistake, and that a trainer had done a gallop on the horse.[6]

12. He and his wife met Malcolm Thwaites and Leigh McKenzie at the Orchard Hotel to discuss the matter. Malcolm Thwaites apologised for the error and offered to a refund on the expenses incurred on Palace Star from April to June 2001 to pay the operation costs. Malcolm Thwaites also asked Gary Desker if he wanted Palace Star back in Singapore but he could not decide without knowing the horse's condition. Malcolm Thwaites promised to keep him informed, but did not follow up on that. He did not hear further about Palace Star until he was informed by the Malayan Racing Association ("MRA") in February 2002 that it would be deleted as it was not raced for more than a

year.

13. Malcolm Thwaites' evidence was that "(s)ometime on or about August 2000, the 1st Plaintiff approached me and told me that he was considering purchasing a horse known as "Palace Star" which he told me had some joint problems. He asked me whether "Palace Star" was suitable for racing and training. I was not asked to give my opinion on the said horse's medical condition."[7]

14. He went to Richard Ang's stable where he examined the horse. He did not detect any injuries although the joints did not look normal. He told Gary Desker that

> "Palace Star" was "worth taking a chance on." Even at this stage, I qualified my comments and made it clear that any purchase of "Palace Star" would be a gamble on the Plaintiffs' part. At this point in time, Palace Star was handicapped at top weight, namely 59 kg and because of its small frame, both of these factors combined with its DJD [degenerative joint disorder] meant that the horse already had three (3) disadvantages in racing.[8]

15. The plaintiffs' pleaded case that Malcolm Thwaites was asked whether Palace Star was a suitable horse for racing raised interesting questions. What does "suitable for racing" mean? Is a positive answer equivalent to an examination by a veterinary surgeon? Taking the second question first, Gary Desker was advised by Charles Leck to send the horse for inspection by a veterinary surgeon before committing himself on the purchase. He knew Malcolm Thwaites is a trainer, not a veterinary surgeon. When he sought his view on Palace Star's suitability for racing, Gary Desker cannot expect to get the equivalent of a veterinary report.

16. Malcolm Thwaites' explanation that

> I understood the 1st Plaintiffs request to mean that he was seeking my expert opinion on the winning potential of "Palace Star" based on my assessment of *inter alia* the race horse's track record and temperament. This opinion was to be given in my capacity as a professional race horse trainer based on my knowledge and experience from my many years of participation in horse racing and dealing with race horses.[9]

was reasonable. He could not have considered himself qualified to give an opinion on a horse's medical condition when he would consult the veterinary surgeons of the Singapore Turf Club and foreign veterinary surgeons like Dr Fulton when there were problems with the horses in his care.

17. Gary Desker acknowledged that he was told that the horse's knee needed treatment by injection.[10] The previous owner Richard Ang described the horse to be in perfectly fine condition "save for some small bruises and minor injuries which are common for race horses" and "its right fore fetlock was swollen due to strain."[11]

18. When Palace Star was brought to the defendants in late August 2000 it was examined again. No swelling, pain or heat nor limp was detected.[12] The horse was trained and raced on six occasions between 28 October 2000 and 3 February 2001. It performed creditably, coming second four times.

19. However in mid-February 2001, it became lame from joint problems.[13] Dr Fulton was engaged to carry out an operation on it. Dr Fulton specialises in horses and has considerable experience in treating them. He also lectures and writes on the subject. Although his practice is in Australia, he has an arrangement with the defendants to make regular visits to their stables.

20. He operated on the front fetlock joints of Palace Star on 4 April 2001. He found ulcerations and erosions in the left fetlock indicative of severe advanced degenerative joint disease. These injuries would have existed four to eight weeks before the surgery[14] but severe degenerative joint disease would have developed less than six months prior to the operation.[15] He noted in his surgery report that retirement of the horse was a real prospect because of the advanced degenerative bone disease in the left fetlock. He proposed two alternatives to retirement, first, to give the horse total rest for four months before undertaking a training program, and second, to treat it for six weeks, then reassess the lameness and pain in the fetlock after six to eight weeks.

21. By the plaintiffs' case, Malcolm Thwaites had informed Gary Desker that the horse needed an injection. The plaintiffs had no basis to dispense with a veterinary report because of anything that Malcolm Thwaites said because he was not a veterinary surgeon and did not give veterinary advice. Malcolm Thwaites' advice was that Palace Star was suitable for racing, and events vindicated him. The horse raced with some success and did not become lame until six months after it was purchased.

22. The plaintiffs also alleged that the horse's condition was caused by negligent handling and training. This complaint was not supported by any evidence. Counsel was left to speculate that "(f)or Palace Star to have entered into these races, the hard training sessions would have been carried out. This would have severely aggravated the joint injuries. There is no other explanation. Certainly, the Defendants have offered none except to say that race horses being what they are, injuries should be expected as part and parcel of their normal misfortune."[16]

23. The horse was not raced again after the operation. It left the defendants' stables and was sent to Ipoh to the stables of K P Hoy. The circumstances were disputed by the parties. The defendants claimed that the plaintiffs gave instructions for that to be done, then countermanded them when the horse was in quarantine in preparation for its journey to Ipoh. Through a mistake on the defendants' part, the horse was not taken out of quarantine and arrived in K P Hoy's stables in Ipoh on 16 June. They did not realise the mistake till Palace Star had been in K P Hoy's custody for 10 days when K P Hoy informed Leigh McKenzie that the horse had gone lame.

24. The plaintiffs' case was that there was never any instruction to send the horse to Ipoh. Gary Desker was shocked when Leigh McKenzie told him that the horse had been sent there by mistake and that it had been put through a gallop.

25. The parties met at the Orchard Hotel in late June to decide what was to be done. The second plaintiff recounted that "(a)t that meeting, Malcolm Thwaites apologised for the mistake and accepted responsibility. He offered to make amends by refunding the costs of the surgery and the training fees for April to June 2001. He also offered to bear all expenses for the horse in Ipoh."[17]

26. The first and second plaintiffs discussed the offer with the other co-owners before accepting the offer. The parties' accounts of the events after the meeting differed. Gary Desker claimed that Malcolm Thwaites promised to check on the condition of Palace Star and revert to him[18] but did not do that. He heard nothing until he was notified by the MRA in February 2002 that the horse would be deleted (the horse was already put down by this time.)

27. Leigh McKenzie deposed that the plaintiffs instructed him after the meeting to obtain a veterinary report. The horse was then examined by Dr Alistair Murdoch of the Perak Turf Club who prepared a report dated 4 July 2001 which noted lameness of the left foreleg and recommended further surgery on the left fetlock and gave warning of "a reduced prognosis for future racing." It was faxed by K P Hoy to the defendants and Leigh McKenzie in turn sent it to the plaintiffs. Leigh McKenzie then received instructions from the second plaintiff that the plaintiffs did not intend to race

Palace Star any further and that it was to be put down.[19]

28. The defendants did not keep records of K P Hoy's transmission of the report to them in July 2001, or their transmission of it to the plaintiffs. They also did not confirm in writing the plaintiffs' instructions to put the horse down. One would expect them to be more careful after the blunder of despatching it to Ipoh.

29. However Leigh McKenzie's account of the events was corroborated by K P Hoy. He gave evidence that Leigh McKenzie had instructed him to get the horse examined, and had subsequently informed him that the owners wanted the horse deleted.

30. Gary Desker's version of the events raised some doubts. When he was told in late June that his horse had been taken to Ipoh by mistake, he was understandably surprised and annoyed, and was only placated by the defendants' offer to waive their fees and bear the operation costs. But he was still concerned about the horse, and he said Malcolm Thwaites promised to keep him informed. Yet he did nothing when he did not hear from him. A reasonable owner would have asked about his horse, but he was apparently content to be kept in the dark. Why did he not ask Malcolm Thwaites or Leigh McKenzie about the horse? The plaintiffs had not forgotten about it. In October 2001 the second plaintiff called the MRA and was informed there was a transfer form signed by Malcolm Thwaites.

31. If the plaintiffs were not kept informed about the horse by the defendants, it would be natural for them to be furious when they got the information from the MRA. It would have been intolerable for the horse to be sent to Ipoh by mistake, then for Malcolm Thwaites to renege on his promise to keep them updated on the horse, then to learn that he had executed a transfer form, and the horse was facing deletion. But they never complained or demanded an explanation.

32. There were questions about both parties' accounts of these events. The defendants' repeated failure to keep proper records reflected poorly on them and their operations, but the plaintiffs' inaction and silence was unbelievable. The reasonable inference is that they were in communication with the defendants as the latter alleged.

33. On these findings, there was a conversion of the horse when it was sent to Ipoh up to the time of the plaintiffs' instructions that Palace Star was to remain in Ipoh pending their further decision. There was no conversion after that time because the plaintiffs had instructed that they did not want the horse any more after receiving Dr Murdoch's report.

34. The defendants pleaded that the plaintiffs cannot sue for conversion because the matter "was fully and finally settled between the Plaintiffs and the 1st Defendants and/or this was in full accord and satisfaction between the Plaintiffs and the 1st Defendants."[20]

35. They contended that

> The 1st Plaintiff and the 2nd Plaintiff admitted on the stand that that the Plaintiffs accepted the 1st Defendant's offered compensation in respect of 'Palace Star' being sent to Malaysia and all consequences flowing from the same, the benefit of which payment credit and refund they enjoyed;
>
> This was corroborated by the oral evidence of the 2nd Defendant and Leigh.[21]

36. There was an agreement. But was that in full and final settlement of the matters discussed?

Malcolm Thwaites' account of the meeting was that

> … I proposed to the 1st, 2nd and 3rd Plaintiffs that the matter be resolved as follows: -
>
> a) the 1st Defendant was to pay for expenses pertaining to the various surgeries performed in Singapore by Dr Fulton, including the surgeries performed before 'Palace Star' was transported to Malaysia;
>
> b) the 1st Defendant was to pay for the expenses pertaining to the transportation of 'Palace Star' to Malaysia and its expenses in Malaysia; and
>
> c) the 1st Defendant was prepared to credit to the Plaintiffs the training fees paid by the Plaintiffs to the 1st Defendant for 'Palace Star' for the months of April and May and to waive the training fees for 'Palace Star' for the month of June.
>
> Speaking on behalf of the 1st Defendant, I also offered to bring 'Palace Star' back to Singapore at the 1st Defendant's expense, but the 1st, 2nd and 3rd Plaintiffs refused stating that they did not want the horse to be brought back to Singapore. They said that they would consider the 1st Defendant's offer and revert accordingly. The meeting ended on good terms and 1st, 2nd and 3rd Plaintiffs said that whatever happened, they wished to put their difference behind them.
>
> Some two (2) days later or so, the 2nd Plaintiff called Leigh and said the Plaintiffs had decided to accept the 1st Defendant's offer. During the same telephone conversation, she again confirmed that 'Palace Star' was not to be brought back to Singapore.[22]

37. Leigh McKenzie deposed that

> (T)he 2nd Defendant proposed that in full and final settlement of any claims the Plaintiffs may have against the 1st Defendant in this matter (which liability is not admitted) and in the interests of maintaining the relationship between the Plaintiffs and the Defendants, the 1st Defendant was prepared to credit to the Plaintiffs the training fees paid by the Plaintiffs to the 1st Defendant for 'Palace Star' for the months of April and May and to waive the training fees for 'Palace Star' for the month of June. In addition, the 1st Defendant was prepared to bear the costs of inter alia the various fees and expenses connected with the sending of 'Palace Star' to Malaysia as well as the costs pertaining to the surgery and treatment of 'Palace Star' before it left Singapore. The 2nd Defendant even offered to return the race horse to Singapore at his own cost.
>
> The 1st and 2nd Plaintiffs said at the meeting that they would consider the matter. On the very next day, the 2nd Plaintiff called me on the telephone and informed me that the Plaintiffs had decided to accept the 1st Defendant's proposal. The 2nd Plaintiff used words to the effect of "lets put the past behind us and go on and look forward to the future."[23]

38. By both accounts, the parties met upon realising that the horse was in Ipoh to decide what was to be done. The defendants accepted responsibility and offered to refund their charges, pay the operation expenses and to bring the horse back to Singapore. This was a damage-control exercise to pacify the plaintiffs. There was nothing in Malcolm Thwaites' and Leigh McKenzie's affidavits or their

evidence in court which showed that the acceptance of the offer extinguished the defendants' liabilities. They said that the plaintiffs were concerned over the horse's condition, and wanted it to be sent for examination before making a final decision. Clearly the plaintiffs did not waive their rights when they accepted the offers in those circumstances.

39. Consequently, that defence fails. However, for the subsequent period when the horse remained in Ipoh with the plaintiffs' knowledge and on their instructions for it to remain in Ipoh pending further examination, the claim for conversion cannot stand. Likewise, there can be no conversion when the horse was deleted and put down on their instruction.

Supreme Gold

40. The plaintiffs' case was that Supreme Gold had its racing career ended by the negligent training and upkeep of the defendants[24] and was eventually put down on 28 August 2001. Supreme Gold was unraced when it was sent to the defendants' stables. While it was there it was raced three times between 3 February and 25 May with poor results.

41. Malcolm Thwaites deposed that Supreme Gold was very immature when it went into his possession, and he took special care that it was given gentle training over a longer period than the usual time.[25] Despite the care, he noticed in mid-March 2001 that there were lumps at the horse's front fetlock joints, and he sent it for examination by veterinary surgeon Dr Martin Lenz of the Singapore Turf Club. Dr Lenz found mild degenerative changes in the fore fetlocks, and advised treatment with intra-articular medication for the joint problem.

42. Malcolm Thwaites advised Gary Desker that Supreme Gold was not good enough to race in Singapore and suggested that it be sent to Malaysia. Gary Desker accepted the suggestion and instructed that it be sent to trainer K L Chong in Ipoh.

43. K L Chong sent Supreme Gold to be examined by Dr Murdoch in Ipoh. Dr Murdoch found early development of osteophytes in both front fetlocks. He advised that it was a common injury of race horses in the MRA circuit and cautioned that the injury usually progresses to eventual pain and lameness. K L Chong raced the horse twice in August. It did not perform, and was eventually put down.

44. Gary Desker deposed that "I would have accepted if the horse was simply not good enough. But Malcolm Thwaites clearly ran the horse to its death, in training and racing."[26]

45. In the closing submissions counsel argued that

> These adverse conditions of Supreme Gold were never disclosed by the Defendants to the Plaintiffs. There was a complete absence of advice from the Defendants except that Supreme Gold was not good enough to compete in Singapore races.
>
> It is clearly probable that these progressive injuries were already afflicting Supreme Gold when it was trained by the Defendants, before it was sent to Ipoh. It could not have happened overnight whilst in K L Chong's custody. Instead, K L Chong did not put the horse into any training but at once sent it to Alistair Murdoch for the examination. It is conclusive evidence that the injuries were sustained and existing while Supreme Gold was in the Defendants' custody.[27]

46. K L Chong, Dr Lenz and Dr Murdoch were not called as witnesses. There was no one to lend

substance to Gary Desker's complaint. The defendants obtained Dr Fulton's views and the two veterinary reports. Dr Fulton examined the radiographs Dr Lenz took of Supreme Gold and was of the opinion that the light training Supreme Gold received in the defendants' care did not cause the rapid deterioration of the joints, and that the osteophytes Dr Murdoch found is a common injury which is not caused by exercise.[28] His views were not challenged in cross-examination. The plaintiffs also did not call any veterinary surgeon to contradict Dr Fulton.

47. Although Supreme Gold carried injuries when it was examined by Dr Lenz and Dr Murdoch, there was no link between the injuries and the treatment it received at the defendants' stables. There was no evidence that the injuries were the result of maltreatment, or that they could be avoided or arrested if the horse had received proper treatment in the defendants' stables.

Classic Sport

48. Classic Sport performed well initially under the defendants' care, but the good performances stopped after May 2001.

49. The defendants arranged for it to be examined by Dr Fulton on 10 July. Dr Fulton put up a report that

> Clinical examination revealed a slightly distended right fore flexor tendon sheath that produced a mild pain reaction when the fetlock region was flexed. Palpation of the flexor tendon demonstrated a small withdrawal reflex. A recommendation for ultrasonographic examination was made.
>
> The ultrasound exam demonstrated the presence of a tenosynovitis of the right fore flexor tendon sheath. Type 1 lesions in the superficial flexor tendon proximal to the tendon sheath and also in the medial branch below the fetlock were also identified. The presence of type 1 lesions in the flexor tendon of thoroughbred race horses is referred to as tendonitis. Interestingly similar lesions were noted in the left for superficial flexor tendon, despite the absence of any pain sensation evident on palpation.
>
> Due to the absence of significant lesions in the tendon within the tendon sheath, I recommended that long acting cortisone be injected into the sheath as there would be an immediate rest from training. The cortisone was recommended to reduce the tenosynovitis present. I recommended a 5-6 week break from training and then to resume as long as the tendon sheath had returned to normal and there was no evidence of discomfort during palpation. Type 1 tendonitis in racing horses can be transitory and does not require the prolonged rest associated with more advanced tendon pathology. Provided the affected area settles so there is no heat, pain or swelling I believe it is reasonable to resume training and continue monitoring the region.[29]

50. According to Malcolm Thwaites, Dr Fulton meant that Classic Sport was to be rested from **full training** for five to six weeks, and he rested it for four weeks, followed by two weeks light trotting.[30] Dr Fulton confirmed that Malcolm Thwaites had understood his recommendations correctly.[31] The second scan was not carried out as the horse was transferred to Stephen Gray about the time it was to be done.

51. Gary Desker was not satisfied with the horse's progress, and arranged for it to be taken out from the defendants' stables with Crypto Charge and transferred to trainer Stephen Gray.

52. When Stephen Gray received the horse he saw a bump on the tendon of the right foreleg[32]

and he sent it to be examined by veterinary surgeon Dr Brian Stewart of the Singapore Turf Club on 3 September. Dr Stewart performed an ultrasound examination of the tendon and reported

> I found the tendon had a hypoechoic (damaged) area of about 20% of the cross sectional area of the mid tendon region.
>
> The damaged area showed significant improvement in the sonographic quality of healing from the previous scan in July.
>
> To encourage tendon fibre alignment and strengthening, it was recommended that light road work with frequent monitoring of the injury be commenced.
>
> The prognosis for future racing after a tendon injury is always guarded to poor.[33]

53. The plaintiffs pleaded that

> i. This racehorse was diagnosed with a tendon injury caused by a strain to its fetlock region on 10.7.01. The 1st, 2nd and 4th Plaintiffs aver and will contend that injuries of this kind mandate total rest for at least 3 to 4 months, followed by a further check by a vet and x-rayed before training is resumed.
>
> … …
>
> iii. In the alternative, which the 1st, 2nd and 4th Plaintiffs do not admit, the Defendants contend that this racehorse resumed training after 1 month's rest in August. There was no further check by a vet. No x-ray was taken. The 1st, 2nd and 4th Plaintiffs aver and will contend that even if this is true, this constitutes a breach of the Defendants' contractual obligations to them.
>
> iv. The 1st, 2nd and 4th Plaintiffs will contend that as a result of this breach, this racehorse did not completely heal. As a direct result of the Defendants' breach, on 3.9.01 the right fore superficial digital flexor tendon of this horse was diagnosed by Dr Brian Stewart as having a hypochoic area of about 20% of the cross sectional area of the mid tendon area. Its prognosis of future racing was found to be 'guarded to poor'.[34]

54. Stephen Gray was a witness for the plaintiffs. He discovered a bump which he also described as a thickening of the tendon on Classic Sport's right fore leg when he received the horse, and sent it to Dr Stewart.

55. From his recollection the horse was rested for five to six months before it was put on light work. After Classic Sport recovered, it raced again, but performed badly as it was out of form. He did not consider it to have a serious tendon injury because it was reparable, and he could not say that Classic Sport's failure was due to the tendon injury.

56. No evidence was led to substantiate the assertion that the horse should have been given total rest for three to four months and be re-assessed by a veterinary surgeon before training is resumed. The plaintiffs did not call anyone knowledgeable in the treatment or training of horses to say that the horse should have been rested for at least three months. The only reference to a three to four month rest period was made by Gary Desker when he informed Malcolm Thwaites that two other horses owned by the plaintiffs recovered fully after being rested for those periods.[35]

57. Likewise, the plaintiffs did not produce anything to contradict Malcolm Thwaites' evidence that Classic Sport was rested for four weeks, and no informed opinion was offered that four weeks' rest was inappropriate or inadequate.

58. No one has stated that Classic Sport should have been rested for at least three months or that one months' rest was insufficient. I doubt that Gary Desker was asserting that because two other horses were rested three to four months, Classic Sport should be rested for three months. If he was, he was doing it with no proper basis.

59. The plaintiffs have not made out the case that Classic Sport should have been rested for a minimum of three months or that the four weeks rest it was given delayed or prevented its recovery.

The counter-claim

60. When the plaintiffs withdrew Classic Sport and Crypto Charge from the defendants' stables, another dispute arose.

61. The plaintiffs wanted to transfer the horses to Stephen Gray immediately. The defendants insisted that if they wanted that they have to pay one month's training fees in lieu of notice. The monthly training fees for each horse was $2,200. The plaintiffs contended that no such payments were due.

62. The defendants pleaded that

> The mutually agreed terms and conditions are inter alia, as follows:
>
> … …
>
> Save where expressly provided otherwise, the agreement between the Plaintiffs and the 1st Defendant would be governed by the recommended general terms and conditions between racehorse trainers and owners as issued by the Association of Racehorse Trainers (Singapore) ("ARTS").[36]

ARTS' Terms and Conditions of Training ("the ARTS' Conditions") provide for one month's payment in lieu of notice. The plaintiffs denied any such agreement.

63. In his affidavit of evidence-in-chief Malcolm Thwaites went further and deposed that

> 13. In any case, I aver and verily believe that it is implied by custom and practice that unless specifically excluded or varied, all contracts between race horse owners and race horse trainers in Singapore would be governed by the recommended general terms and conditions between racehorse trainers and owners issued by ARTS.
>
> 14. I further aver and verily believe that it is implied by custom and practice that unless specifically excluded or varied, all contracts between race horse owners and race horse trainers in Singapore would include the various terms set out in the recommended general terms and conditions between racehorse trainers and owners issued by ARTS.
>
> … …
>
> 16. Further, I aver that it is a clear and common practise that race horse owners who intend to

terminate their contracts with race horse trainers must give the race horse trainer at least one (1) month's notice, failing which one (1) month's basic training fee in respect of the horse being withdrawn from the race horse trainer's care, training and management in question is due and payable to the race horse trainer in lieu of notice."[37]

64. It was noteworthy that Malcolm Thwaites did not say in his affidavit of evidence-in-chief that the plaintiffs had expressly agreed that there shall be payment in lieu of notice, or that the ARTS' conditions were to apply.

65. When questioned in court, Malcolm Thwaites said he had mentioned to Gary Desker that one month' payment in lieu of notice was payable, but not with reference to the ARTS' conditions.[38] This was inconsistent with the pleaded counter-claim that the ARTS' conditions were agreed to, and with the affidavit of evidence-in-chief that the term was incorporated by custom and practice.

66. The defendants stated in the closing submissions that

> … it was an express term of the contract between the Plaintiffs and the 1st Defendant that should the Plaintiffs wish to remove their horses from the 1st Defendant's stables, the Plaintiffs are obliged to give the 1st Defendant at least one (1) month's notice of their intention so to do, failing which the Plaintiffs are obliged to pay one (1) month's training fees for each horse they intend to move out of the 1st Defendant's stables.
>
> …
>
> Further and/or in the alternative, it is submitted that it is an implied term of the contract that the trainer must be given one (1) month's notice or be paid one (1) month's training fees in lieu of notice.

and that

> Insofar as implied terms are concerned, the law will imply terms into a contract on several grounds, inter alia: -
>
> a) A term will be implied into a contract if it is necessary to give business efficacy to the contract; and/or
>
> b) A term will be implied in a contract if it is so obviously a stipulation in the agreement that the parties must have intended it to form part of their contract.[39]

It was noteworthy that no reliance was made on Malcolm Thwaites' reference to custom and practice.

67. While the plaintiffs maintained throughout that there was no agreement the defendants alleged variously that

(i) the agreement was governed by the ARTS' conditions,

(ii) the ARTS' conditions applied by custom and practice,

(iii) the ARTS' conditions are implied to give business efficacy to the contract.

68. The lack of consistency did not help on the defendants' case. The first ground cannot hold because the ARTS is a trainers' association. It has no control over horse owners and cannot limit or impose terms into the training agreements they enter into. ARTS can put up standard conditions for training agreements that it considers to be fair to trainers and owners. ARTS and its members can recommend or require that those conditions be incorporated into the agreement with an owner. If the owner agrees, that shall form part of the training agreement. But if that is not recommended, or if the owner does not agree, he is not bound by the conditions. As Malcolm Thwaites had not stated in evidence that Gary Desker or the plaintiffs agreed to the ARTS' conditions, they do not apply.

69. The defendants were not entitled to rely on custom and practice to invoke the ARTS' conditions because this was not their pleaded case. They pleaded that the parties had agreed that the terms and conditions were to apply to the training agreement. They did not plead that independently of the alleged mutual agreement, the conditions applied through custom or practice.

70. Even if they had, they still fail. They adduced evidence from Bernard Ang, president of ARTS on the background to the ARTS' conditions. He explained that the conditions were compiled in July 2002, from the conditions used in practice, adding that "ARTS was formed in November 1996. Before then there was no association, no body to represent trainers in Singapore. Trainers based in Singapore had their own sets of rules for contracts with owners and that by and large they would have similar terms and conditions, including that for payment in lieu of notice."[40] That implied that it was not the universal practice of all trainers. He did not explain whether any effort was made by him or ARTS to ascertain how prevalent the practice was to impose such a condition.

71. His evidence revealed that the ARTS' conditions were not in existence when the training agreements between the plaintiffs and the defendants were made. Furthermore the practice from which they were drawn was not accepted by all trainers and owners, and cannot be incorporated into the agreement by custom and practice.

72. The alternative claim that the condition should be implied on the ground of business efficacy was also without basis. It is not unbusiness-like for a trainer not to insist on payment in lieu of notice; that may persuade more owners to sign on with him. And if a payment must be imposed for business efficacy, why one month's payment? Why not a fortnight's, or two months'?

Conclusion

73. The defendants had converted Palace Star when they sent it to Ipoh till the time when the plaintiffs decided that it was to remain there pending a further examination. The plaintiffs are to receive damages for this period of conversion to be assessed by the Registrar. They are also to get costs for this part of their claim. The Registrar shall determine after the assessment whether these costs are to be taxed on the High Court, District Court or Magistrate's Court scale. The costs of the assessment are also to be decided by the Registrar. The rest of the plaintiffs' action is dismissed with costs.

74. The defendants' counterclaim is dismissed, with costs to be taxed on the Magistrate's Court scale.

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[1]Notes of Evidence page 53

[2]Gary Desker's affidavit of evidence-in-chief para 25(b)

[3] Gary Desker's affidavit of evidence-in-chief para 25(d)

[4] Statement of Claim para 9

[5] Gary Desker's affidavit of evidence-in-chief para 29

[6] Gary Desker's affidavit of evidence-in-chief para 34

[7]Malcolm Thwaites' affidavit of evidence-in-chief para 97

[8]Malcolm Thwaites' affidavit of evidence-in-chief para 103

[9] Malcolm Thwaites' affidavit of evidence-in-chief para 98

[10]Gary Desker's affidavit of evidence-in-chief para 25(d)

[11]Richard Ang Ah Lah's affidavit of evidence-in-chief para 8

[12]Notes of Evidence page 318

[13]Notes of Evidence page 310

[14]Notes of Evidence page 220

[15] Notes of Evidence pages 220-223

[16]Plaintiffs' Closing Submissions para 91

[17]Chia Swee Tin's affidavit of evidence-in-chief para 19

[18]Gary Desker's affidavit of evidence-in-chief para 37

[19]Leigh McKenzie's affidavit of evidence-in-chief paras 56-7

[20]Amended Defence and Counterclaim para 72B

[21]Defendants' Submissions for the Trial paras 9.1 and 9.2

[22]Malcolm Thwaites' affidavit of evidence-in-chief paras 130-132

[23]Leigh McKenzie's affidavit of evidence-in-chief paras 53 and 54

[24]Plaintiffs' Opening Statement para 11

[25]Malcolm Thwaites' affidavit of evidence-in-chief paras 81-2

[26]Gary Desker's affidavit of evidence-in-chief para 53

[27]Plaintiffs' Closing Submissions para 176

[28]Ian Fulton's affidavit of evidence-in-chief paras 38 and 41

[29]Bundle of Injunction Cause Papers and Correspondence

[30]Notes of Evidence pages 401-2

[31]Notes of Evidence pages 255, 257

[32]Notes of Evidence page 159

[33]Report of Dr Brian Stewart dated 20 September 2001

[34]Statement of Claim para 5(a)(i) – (iv)

[35]Letter of Gary Desker to Malcolm Thwaites dated 26 September 2001

[36] Amended Defence and Counterclaim para 6(d)

[37]Malcolm Thwaites' affidavit of evidence-in-chief paras 13, 14 and 16

[38]Notes of Evidence pages 371-2

[39]Defendants' Submissions for the Trial paras 10.1, 10.2 and 10.4

[40]Notes of Evidence page 541

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